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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JEREMY JOSEPH ROBBINS, Defendant and Appellant.	D073614 (Super. Ct. No. RIF1402761)

APPEAL from a judgment of the Superior Court of Riverside County, Becky Lynn Dugan and Elisabeth Sichel, Judges. Affirmed.

Robert L.S. Angres, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael P. Pulos and Adrian R. Contreras, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

By way of a first amended information, the People charged Jeremy Joseph Robbins with one count of murder (§ 187, subd. (a)), together with a prior strike (§§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)) and a prior serious felony allegation (§ 667, subd. (a)). After a jury was unable to reach a verdict on the murder charge, the trial court declared a mistrial.

Prior to the retrial, the trial court granted the People's request to file a second amended information to add a count of assault with force likely to produce great bodily injury (§ 245, subd. (a)(4)), and an accompanying great bodily injury enhancement allegation (§ 12022.7, subd. (a)). A jury found Robbins not guilty of murder, but guilty of the lesser included offense of involuntary manslaughter (§ 192, subd. (b)). With respect to count 2, the jury found Robbins guilty of assault with force likely to produce great bodily injury, and found true the accompanying great bodily injury enhancement allegation.

The court sentenced Robbins to 16 years in prison on count 2. The court imposed an eight-year term on count 1, but stayed execution of that term pursuant to section 654.

On appeal, Robbins contends that the People's filing of the second amended information to add the charge of assault with force likely to produce great bodily injury and the accompanying great bodily injury enhancement constituted impermissible vindictive prosecution. Robbins also maintains that his sentence violated the prohibition

on "unusual" punishments in the California Constitution.[1] (Cal. Const., art. I, § 17.) We affirm the judgment.

II.

FACTUAL BACKGROUND

On March 22, 2014, Robbins inadvertently left some dry-cleaning at a car wash in Menifee. The following day, Robbins returned to the car wash to try to retrieve his clothes. While outside the car wash, Robbins angrily accused a car wash employee, the victim, Wesley Uyekawa, of stealing the clothes.

During the confrontation, Uyekawa reached into his pocket and began to pull out a cell phone. Robbins grabbed Uyekawa's hand, took the phone, and punched Uyekawa in the face. Uyekawa fell to the ground and grabbed onto Robbins's leg. Robbins kicked the victim away, stomped on him in the abdominal area, and smashed the cell phone. Robbins then returned to his car and left.

Uyekawa called 911 and paramedics transported him to the hospital. After his initial discharge, Uyekawa was taken back to the hospital later that day when he continued to suffer severe pain. Uyekawa was discharged from the hospital for a second time that same day. He returned to his residence, which was located on the site of the car wash. The following morning, a co-employee went to check on Uyekawa, and found him dead.

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1 Robbins also requests that this court review a sealed transcript of an ex parte hearing in order to assess whether the trial court properly determined that the People were not required to disclose certain material to the defense under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

A coroner determined that Uyekawa suffered blunt force trauma to the abdomen, which ruptured his small intestine. The rupture caused Uyekawa to suffer sepsis, which caused his death.

III.

DISCUSSION

A. *The prosecutor's filing of the second amended information alleging one count of assault with force likely to produce great bodily injury with a great bodily injury enhancement did not constitute vindictive prosecution*

Robbins claims that the prosecutor's filing of the second amended information alleging a count of assault with force likely to produce great bodily injury with a great bodily injury enhancement, constituted vindictive prosecution that is prohibited by the state and federal constitutions.

1. *Standard of review*

The California Supreme Court has not definitively determined the standard of review to be applied to a claim of vindictive prosecution. (See *People v. Ayala* (2000) 23 Cal.4th 225, 299 [rejecting defendant's claim of vindictive prosecution "under any standard of review"].) We also need not determine this issue, since, for the reasons discussed below, Robbins's claim fails under any standard.

2. *Governing law*

"It is 'patently unconstitutional' to 'chill the assertion of constitutional rights by penalizing those who choose to exercise them.' [Citation.]" (*People v. Valli* (2010) 187 Cal.App.4th 786, 802.) "[T]he due process clauses of the federal and state Constitutions (U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, §§ 7, 15) forbid the prosecution

from taking certain actions against a criminal defendant, such as increasing the charges, in retaliation for the defendant's exercise of constitutional rights." (*People v. Jurado* (2006) 38 Cal.4th 72, 98.)

In *Twiggs v. Superior Court* (1983) 34 Cal.3d 360 (*Twiggs*), the California Supreme Court considered the prosecutorial vindictiveness doctrine in the context of a retrial after a mistrial. In *Twiggs*, after the defendant's first trial resulted in a mistrial due to a hung jury, the defendant rejected the prosecutor's offer to plead guilty in exchange for a three-year prison sentence. (*Id.* at p. 364.) A few days *after* the defendant rejected the plea offer, the prosecutor moved to amend the information to allege five prison prior allegations (§ 667.5). (*Twiggs*, *supra*, at p. 364.) The *Twiggs* court concluded that these circumstances raised the presumption of prosecutorial vindictiveness, reasoning, "Here, the defendant has endured a trial and a mistrial due to a hung jury, and when he asserts his right to a jury retrial rather than plead guilty and accept a prison term, he is faced with the possibility of a greater punishment than he could have received if the prosecution had secured a conviction, apparently as a result of pursuing his right to be tried by a jury on retrial." (*Id.* at p. 369.)

In reaching this conclusion, the *Twiggs* court distinguished *Bordenkircher v. Hayes* (1978) 434 U.S. 357, 358 (*Bordenkircher*), in which the United States Supreme Court limited the scope of the doctrine of prosecutorial vindictiveness in the context of plea negotiations. The *Bordenkircher* court concluded that due process is *not* "violated when a state prosecutor carries out a threat made during plea negotiations to reindict the

accused on more serious charges if he does not plead guilty to the offense with which he was originally charged." (*Id.* at p. 358.)

In *Bordenkircher*, the defendant was charged with an offense punishable by a term of two to ten years. (*Bordenkircher, supra*, 434 U.S. at p. 358.) During plea negotiations, the prosecution offered to recommend a sentence of five years in exchange for the defendant's guilty plea. (*Ibid.*) The prosecutor also explained that, if the defendant were to refuse to plead guilty, he would seek an indictment under a recidivist statute that would subject the defendant to a life sentence upon conviction. (*Id.* at p. 358–359.) The *Bordenkircher* court concluded that the prosecutor's conduct did not constitute vindictive prosecution, reasoning in part:

> "While the prosecutor did not actually obtain the recidivist indictment until after the plea conferences had ended, his intention to do so was clearly expressed at the outset of the plea negotiations. [The defendant] was thus fully informed of the true terms of the offer when he made his decision to plead not guilty. This is not a situation, therefore, where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant's insistence on pleading not guilty." (*Id.* at p. 360.)

The *Bordenkircher* court reasoned that vindictiveness is not established "so long as the accused is free to accept or reject the prosecution's offer." (*Bordenkircher, supra*, 434 U.S. at p. 363.) The *Twiggs* court distinguished *Bordenkircher* on this ground, noting that the defendant in *Twiggs* had *not* had a chance to accept or reject a plea offer with respect to the amended information at issued in that case. The *Twiggs* court reasoned:

> "Thus, *Bordenkircher v. Hayes* specifically did not decide the issue of vindictiveness presented in a case such as this, where the record suggests that the more serious charges were not part of the 'give-and-take' of plea negotiations. Rather, in this case, the circumstances strongly suggest that the prosecutor *unilaterally* imposed a penalty in *response* to the defendant's insistence on facing a jury retrial." (*Twiggs, supra*, 34 Cal.3d at p. 371, italics added.)

In *In re Bower* (1985) 38 Cal.3d 865, 876 (*Bower*), the California Supreme Court cited *Bordenkircher* and stated, "The exception [to the prosecutorial vindictiveness doctrine] recognized in the federal case law for plea bargaining is also recognized in California (*People v. Rivera* (1981) 127 Cal.App.3d 136, 144 [(*Rivera*)]) . . . . The California cases place great emphasis on when during the proceedings the prosecutor's allegedly vindictive action occurs." The *Bower* court, however, noted that, under *Twiggs*, an amendment that increases the charges and is *not* part "of the give-and-take of plea negotiations," may raise the presumption of vindictiveness. (*Bower*, *supra*, at p. 877, quoting *Twiggs*, *supra*, 34 Cal.3d at p. 371.)

Where the presumption of vindictiveness arises, "In order to rebut the presumption . . . , the prosecution must demonstrate that (1) the increase in charge was justified by some objective change in circumstances or in the state of the evidence which legitimately influenced the charging process and (2) that the new information could not reasonably have been discovered at the time the prosecution exercised its discretion to bring the original charge." (*Bower*, *supra*, 38 Cal.3d at p. 879.)

3. *Factual and procedural background*

In December 2015, the People filed a first amended information charging Robbins with one count of murder, together with strike and prior serious felony conviction

allegations. The trial court held a jury trial in January 2016. The jury was unable to reach a verdict on the murder charge, and the court declared a mistrial.

Prior to the retrial, on June 10, 2016, the trial court held a hearing for the purpose of determining whether the matter could be settled pursuant to a plea bargain. At the hearing, the court stated, "I really think that we're talking about a range of somewhere in the 17 years location as being something that could be sold to both sides." The court asked Robbins whether he would be interested in accepting a plea that would result in such a sentence. Robbins responded in the negative.

On or about that same date, the People filed a brief requesting permission to file a second amended information.[2] In their brief, the People requested permission to allege one count of assault with force likely to produce great bodily injury and an accompanying great bodily injury enhancement. The People argued that the amendment was supported by the evidence adduced at the preliminary hearing. In addition, the People maintained that the proposed amendment did not raise a presumption of vindictive prosecution. In support of this argument, the People noted that the amendment occurred in the pretrial setting. The People also argued that the proposed amendment did not "substantially increase [Robbins's] exposure beyond what is already charged."[3] In addition, the

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2 The brief is dated June 10. At a June 13 hearing on the People's request to file the second amended information, the trial court indicated that it had reviewed the brief. However, for reasons that are not clear from the record, the brief was not filed in the trial court. While this appeal was pending, we granted Robbins's request to augment the record to include a copy of the brief.

3 In fact, the proposed amendment did not increase Robbins's maximum exposure beyond what he faced in the first amended information *by any amount*. Prior to the

prosecutor stated that he had provided "actual notice to defense counsel that this amendment would be occurring prior to May 26, 2016." (Italics omitted.)

The trial court held a hearing on the prosecutor's request. At the hearing, defense counsel argued that the People should not be permitted to file the second amended information because there had not been "any new information that was developed in the first case that would give the [prosecution] a good reason to add this charge other than I believe it's vindictive prosecution." However, defense counsel confirmed that he was aware that the People intended to file the information prior to the June 10 hearing at which Robbins rejected the court's attempts to settle the case:

> "The court: But you knew coming into this trial they were going to seek to amend; right? We were working on settling the case . . . . I want to confirm that.
>
> "[Defense counsel]: Yes.
>
> "The court: And when we were trying to see if we could settle the case Friday[, June 10], this charge was present; correct? And we tried to settle it for about that exposure, and your client did not want to do that at that point; correct?
>
> "[Defense counsel]: That is correct, yes. I'm not saying that it was something that was done over the weekend. We did in fact talk about the People wanting to amend to add this charge on Friday[, June 10]."

The prosecutor argued that the People possessed the legal authority to file the amendment "at any point." The prosecutor noted that the amendment did not

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amendment, Robbins faced a potential 35 years-to-life sentence on count 1. The proposed amended information charged the same offense in count 1 as had been charged in count 1 of the first amended information and added count 2, which carried a potential 16-year maximum sentence.

"substantially raise[ ] [Robbins'] exposure," and that Robbins had faced a sentence of 35 years to life prior to the amendment. The prosecutor further argued that defense counsel was aware of the proposed amendment on May 26, 2016—before the failed plea negotiation conference on June 10. In addition, the prosecutor stated that the filing of the proposed second amended information arose after he had conducted "legal research" on a different potential amendment, and added that he had engaged in "numerous discussions with [his] supervisors," as to whether to file the proposed second amended information.

The trial court ruled that filing the second amended information would not constitute vindictive prosecution. The court found that, even if the presumption of vindictiveness had arisen, the prosecutor had rebutted any such presumption in light of the "tactical consideration[s]" that the prosecutor referred to in his argument. Accordingly, the court permitted the People to filed the second amended information.

4. *Application*

The record does not contain evidence that raises the presumption that the filing of the second information constitutes vindictive prosecution. To begin with, we are aware of no authority supporting the proposition that the presumption of vindictiveness may be raised by the filing of charges in an amended pleading that do *not* raise the possibility of the defendant serving a sentence more severe than he would have faced if he had been convicted of the charged offenses contained in the original pleading.[4] In *Twiggs*, the

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4 In his reply brief, Robbins acknowledges that he is aware of no authority supporting the proposition that a presumption of vindictiveness may arise by the

Supreme Court explained that a presumption of vindictive prosecution could arise, on retrial after a mistrial, where the defendant is "*faced with the possibility of a greater punishment than he could have received if the prosecution had secured a conviction . . . .*" (*Twiggs, supra,* 34 Cal.3d at p. 369, italics added; accord *People v. Ledesma* (2006) 39 Cal.4th 641, 731 (*Ledesma*) [stating that an inference of vindictive prosecution may be raised on retrial if "the prosecution increases the charges so that the defendant faces *a sentence potentially more severe* than the sentence he or she faced at the first trial" (italics added)].)[5] In this case, it is undisputed that after the filing of the second amended information, Robbins was not facing a sentence potentially more severe than if he had been convicted of the murder charge in the first amended information.

However, even assuming, strictly for purposes of argument, that a presumption of vindictive prosecution may arise by an amendment that does *not* increase a defendant's maximum potential prison sentence—for example, where the new charge increases the likelihood that the defendant will serve a lengthier sentence than he would have faced if he had been acquitted of the charged offense in the original pleading—it is clear that the filing of the second amended information did not raise any such presumption in this case. Robbins contends that a presumption of vindictiveness arose because the People filed the

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prosecution's filing of an amended information that does not expose the defendant to a higher maximum potential prison sentence than he faced prior to the amendment.

5 While the *Ledesma* court was speaking of a retrial after a successful *appeal* (*Ledesma, supra,* 39 Cal.4th at p. 731), the *Twiggs* court made clear that a presumption of vindictiveness may be raised where the prosecution "increased the charges" in anticipation of a retrial after a *mistrial*. (*Twiggs, supra,* 34 Cal.3d at p. 371.)

second amended information in *retaliation for* his rejection of their plea offer and his insistence on a retrial.

This argument fails because it is undisputed that Robbins was aware of the People's intent to file the amended information *before* the June 10 hearing at which he rejected the People's plea offer. Defense counsel expressly acknowledged as much at the June 13 hearing on the People's request.[6] Under these circumstances, the law is clear that the People's filing of new charges does *not* raise a presumption of vindictiveness. (*Bordenkircher*, *supra*, 434 U.S. at p. 360 [concluding no prosecutorial vindictiveness is demonstrated where prosecutor seeks indictment increasing severity of potential sentence because defendant knew of prosecutor's intent to seek indictment prior to the time that he rejected plea offer]; *Rivera*, *supra*, 127 Cal.App.3d at p. 144 [applying *Bordenkircher*'s analysis as matter of California law]; *Bower*, *supra*, 38 Cal.3d at p. 876 [adopting *Rivera*].) Contrary to *Twiggs*, upon which Robbins heavily relies, there is no evidence that suggests that "the prosecutor *unilaterally* imposed a penalty in *response to* the defendant's insistence on facing a jury retrial. . . ." (*Twiggs*, *supra*, 34 Cal.3d at p. 371, italics added.) Rather, the undisputed evidence demonstrates that Robbins knew that the prosecutor intended to file the second amended information prior to Robbins's rejection

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6 In addition, defense trial counsel filed a declaration in this court that states:

> "*A few weeks prior* to June 13, 2016, I became aware that the prosecution intended to amend the information to include count two, i.e. assault with force likely to create great bodily injury." (Italics added.)

Counsel filed the declaration in connection with Robbins's request to augment the record. (See fn. 2, *ante*.)

of the plea offer. Thus, it cannot be said that the prosecutor filed the amended information in *retaliation* for Robbins's exertion of his right to undergo a retrial.

Accordingly, we conclude that Robbins failed to present any evidence raising a presumption of vindictiveness and that Robbins was not subjected to a vindictive prosecution.[7]

B. *Robbins's sentence does not constitute "unusual" punishment under the California Constitution*

Robbins contends that his sentence of 16 years in prison on count 2, assault with force likely to produce great bodily injury (§ 245, subd. (a)(4)), is impermissibly "unusual" under the California Constitution. (Cal. Const., art. I., § 17 ["Cruel or unusual punishment may not be inflicted"].) In support of this argument, Robbins notes that the maximum sentence on count 1, involuntary manslaughter (§ 192, subd. (b)) with a strike prior, was eight years. He further argues that, under the circumstance of this case, assault with force likely to produce great bodily injury is a lesser included offense of involuntarily manslaughter, and that he was unconstitutionally "punished more severely for the lesser offense." Robbins contends that the "logic" of the California Supreme Court's decision in *People v. Schueren* (1973) 10 Cal.3d 553, 556 (*Schueren*), supports this argument.

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[7] In light of our conclusion that Robbins failed to present any evidence raising the presumption of vindictiveness, we need not consider whether the trial court properly determined that the People had rebutted any presumption that had arisen.

1. *Factual and procedural background*

As noted in part I, *ante*, the People charged Robbins with murder (§ 187, subd. (a)) (count 1) and assault with force likely to produce great bodily injury (count 2) (§ 245, subd. (a)(4)). With respect to count 2, the People alleged a great bodily injury enhancement (§ 12022.7, subd. (a)). The People also alleged that Robbins had suffered a prior conviction that was both a serious felony (§ 667, subd. (a)) and a strike (§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)).

With respect to count 1, the jury found Robbins not guilty of murder, but guilty of the uncharged lesser included offense of involuntary manslaughter (§ 192, subd. (b)). The jury also found Robbins guilty as charged on count 2, and found the accompanying great bodily injury enhancement to be true. Robbins admitted having suffered the conviction that constituted the basis of the serious felony and strike enhancement allegations.

Robbins filed a sentencing brief in which he argued that to sentence him "to 14 or 16 years for the convictions he received in this case" would constitute cruel or unusual punishment under the California Constitution, among other contentions. In support of this claim, Robbins argued in part:

> "California law expressly prohibits the imposition of a [section] 12022.7 [great bodily injury enhancement] on an [i]nvoluntary [m]anslaughter conviction. Involuntary [m]anslaughter is also neither a serious, nor violent felony. If Mr. Robbins was convicted solely of the [i]nvoluntary [m]anslaughter conviction which reflects a much more serious offense, his minimum sentence under the statutory scheme would be 4 years, with a maximum of 8. However, under the [a]ssault conviction with [great bodily injury], under the statutory scheme, the minimum sentence, if all enhancements are

> imposed, jumps to 12 years with a maximum of 16 years. There is something fundamentally unusual about the massive discrepancy between the two convictions, despite [*sic*] the one requiring far more serious consequences for less serious conduct."

At sentencing, defense counsel reiterated Robbins's contention that it would constitute cruel or unusual punishment to sentence him to 16 years on count 2, given that the maximum punishment on count 1 for involuntary manslaughter (§ 192, subd. (b)) with a strike prior was eight years. Defense counsel argued in part, "it seems that the more substantial conduct here is the involuntary manslaughter portion of it, not the assault," and that it would therefore be "unfair" to sentence Robbins to 16 years on the "lesser" assault charge and its accompanying enhancements.[8]

Without specifically addressing Robbins's cruel or unusual punishment contention, the trial court sentenced him to an aggregate sentence of 16 years in prison. The court selected assault with force likely to produce great bodily injury (§ 245, subd. (a)(4)) (count 2) as the primary count and sentenced Robbins to 16 years on that count. The sentence on count 2 consisted of the upper term of four years (§ 245, subd. (a)(4)),

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8 As noted above, in his sentencing memorandum, Robbins argued that California law prohibits imposing a great bodily injury enhancement on an involuntary manslaughter conviction. Robbins is correct. (See, e.g., *People v. Lamb* (2017) 8 Cal.App.5th 137, 142 [citing § 12022.7, subd. (g) [stating that a great bodily injury enhancement " 'shall not apply to . . . manslaughter' "].)

At the sentencing hearing, defense counsel correctly noted that the prior serious felony enhancement (§ 667, subd. (a)) could not be imposed with respect to count 1, since involuntary manslaughter is not a serious felony. (See §§ 667, (a)(1) [providing five-year enhancement for "any person *convicted of a serious felony* who previously has been convicted of a serious felony in this state" (italics added)]; § 667, (a)(4) ["As used in this subdivision, 'serious felony' means a serious felony listed in subdivision (c) of Section 1192.7"].) Involuntary manslaughter is *not* listed as a serious felony in section 1192.7, subdivision (c).

doubled to eight years due to the strike prior (§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)), together with a consecutive three-year term for the great bodily injury enhancement (§ 12022.7, subd. (a)) and a consecutive five-year term for the serious felony prior enhancement (§ 667, subd. (a)). With respect to the involuntary manslaughter conviction (§ 192, subd. (b)) (count 1), the court sentenced Robbins to an upper term of four years (§ 192, subd. (b)), doubled to eight years due to the strike prior (§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)). The court stayed execution of the sentence on count 1 pursuant to section 654.

2. *Schueren*

In *Schueren*, the California Supreme Court concluded that a defendant's sentence violated the prohibition on " 'unusual' " punishments in the California Constitution. (*Schueren, supra,* 10 Cal.3d at pp. 560–561.) The defendant in *Schueren* was charged with a single count of assault with a deadly weapon with the intent to commit murder (former § 217). (*Schueren, supra,* at p. 555.) A jury convicted the defendant of the uncharged lesser included offense of assault with a deadly weapon (former § 245, subd. (a)). (*Schueren*, at p. 556.) The trial court sentenced him to " 'the term prescribed by law.' " (*Ibid.*) The *Schueren* court described the penalties for the lesser uncharged offense for which the defendant was convicted (former 245, subd. (a)) and the charged offense (former § 217) as follows:

> "The penalty provided by . . . [former] section 245, subdivision (a), for a violation of that subdivision is imprisonment in the state prison for six months to *life* or a county jail term or fine; the penalty provided by . . . [former] section 217 for a violation of that section is one to *fourteen years* in prison. Under the judgment, as it now

> reads, defendant is faced with the possibility of life in prison, whereas, according to defendant, had he been convicted of the crime charged his maximum term of imprisonment could not have exceeded 14 years." (*Schueren*, at pp. 556–557, fn. omitted.)

On appeal, the Supreme Court considered whether the prohibition in the California Constitution against " 'cruel or unusual punishment' preclude[d] [imposing] a sentence exceeding 14 years for a defendant charged with assault with intent to commit murder [(former § 217)] and convicted of assault with a deadly weapon [(former § 245, subd. (a))] as a necessarily included offense. (*Schueren, supra*, 10 Cal.3d at p. 557.) The *Schueren* court agreed with the defendant that, under these circumstances, a sentence exceeding 14 years would constitute a prohibited "unusual" punishment under the California Constitution. (*Schueren*, at pp. 560–561.) The court reasoned in part:

> "Here had defendant pleaded guilty to the offense charged or been found guilty of that offense his prison term could not have exceeded 14 years but by asserting his constitutional rights against self-incrimination and to a jury trial and by successfully defending against the crime charged but not against an included offense, he is now faced with the possibility of life in prison. Under the circumstances we believe that a prison term exceeding 14 years is, literally, an 'unusual' punishment - i.e., a punishment that in the ordinary course of events is not inflicted. It would seem indisputable that an accused is normally not subject to an increased maximum prison term as a consequence of, inter alia, exercising his constitutional rights *and* successfully defending against the crime charged." (*Id.* at p. 557.)

The *Schueren* court stressed that its decision applied only to the particular "circumstances of [that] case." (*Schueren, supra*, 10 Cal.3d at p. 561.) The *Schueren* court also suggested that a lesser included offense *may* be punished more severely than a greater offense, so long as the defendant is convicted of *both* offenses:

> "Our decision should not handicap law enforcement. The People are still free to charge violations of sections 217 and 245 in separate counts. Should a defendant be convicted on both counts thus separately pleaded Penal Code section 654 precludes multiple punishment for a single act, and normally in order to prevent multiple punishment the lesser penalty is stayed . . . ." (*Id.* at p. 561.)

3. *Application*

Even assuming, strictly for purposes of this opinion, that Robbins is correct that assault with force likely to produce great bodily injury is a lesser included offense to involuntary manslaughter "under the circumstances of this case,"[9] it is clear that Robbins's sentence was not unconstitutionally " 'unusual' " under *Schueren*. (*Schueren*,

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9 " 'Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser.' " (*People v. Hicks* (2017) 4 Cal.5th 203, 208–209.) Robbins does not contend that either test was satisfied in this case. Rather, he argues, "Given that the two offenses stemmed from the *same conduct*, a finding by this Court that the assault amounts to a lesser included offense of involuntary manslaughter in the context of this case would be appropriate." (Italics added.) We are skeptical of the validity of Robbins's "same conduct" lesser included offense theory, but assume that he is correct that assault with force likely to produce great bodily injury is a lesser included offense of involuntary manslaughter under the circumstances of this case. Nevertheless, his claim fails for the reasons stated in the text.

supra, 10 Cal.3d at pp. 560–561.)[10] The *Schueren* defendant's sentence was unconstitutionally unusual because he faced an "increased maximum prison term as a consequence of, inter alia, exercising his constitutional rights *and* successfully defending against the crime charged." (*Id.* at p. 560.) In this case, Robbins did *not* face an increased maximum prison term as a consequence of successfully defending against the charged crime of murder. If Robbins had been convicted of the murder charge in count 1, he would have faced a life sentence. (§ 189.) Instead, by virtue of his successful defense to the murder charge on count 1 at the second trial, Robbins faced a sentence of 16 years on count 2. Under these circumstances, it is clear that that Robbins's sentence is not unconstitutionally unusual under *Schueren*, *supra*, at pages 560–561.[11]

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10 We also assume for purposes of this opinion that Robbins adequately preserved this claim in the trial court, notwithstanding that he did not cite *Schueren* in the trial court and the trial court did not expressly rule on his contention that to sentence him to 16 years in prison on count 2 would constitute cruel or unusual punishment.

11 *Schueren* is also distinguishable from this case because Robbins was convicted of *both* the offense of involuntary manslaughter and the purported lesser included offense of assault with force likely to produce great bodily injury. As noted in part III.B, *ante*, the *Schueren* court suggested, but did not expressly state, that a defendant convicted of *both* a lesser and greater offense in separate counts may be punished more severely for the lesser offense, and punishment on the greater offense stayed pursuant to section 654. (*Schueren*, *supra*, 10 Cal.3d at p. 561.) In this case, as noted in the text, the trial court imposed a sentence on both counts, but stayed execution of the sentence on the involuntary manslaughter count pursuant to section 654.

C. *The trial court did not err in determining that the People were not required to disclose certain material to the defense pursuant to* Brady

Prior to the trial, the prosecutor asked the trial court as a "precaution" to hold an ex parte hearing in order to review certain material to determine whether the prosecutor had an obligation to disclose the material to the defense under *Brady*, *supra*, 373 U.S. 83. The prosecutor explained that the information pertained to a witness whom the prosecutor did not intend to call at trial. The prosecutor stated further, "My office and . . . I do not believe it's *Brady*, but to be on the cautious side . . . I would like to present it to [the court]." In response to the prosecutor's request, the trial court held a hearing in chambers outside the presence of the defense. At the conclusion of the ex parte hearing, the court stated in open court, "The Court found that it was not *Brady* material. So there's no disclosure."

Robbins requests that this court review the sealed record of the ex parte hearing to determine whether the prosecutor had an obligation under *Brady* to disclose the material discussed at the hearing. (*People v. Myles* (2012) 53 Cal.4th 1181, 1209 [conducting independent review of sealed records in determining whether trial court erred in determining that prosecutor was not required to disclose certain information to the defense under *Brady*].)

We have independently reviewed the sealed transcript of the ex parte hearing. We conclude that the trial court did not err in determining that no disclosure under *Brady* was required.

IV.

DISPOSITION

The judgment is affirmed.

AARON, J.

WE CONCUR:

NARES, Acting P. J.

IRION, J.